United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4193

To be argued by
Alfred D. Youngwood

United States Court of Appeals
For the Second Circuit

AHMET ERTEGUN AND IOANA ERTEGUN,
Petitioner-Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee,

GERALD WEXLER AND SHIRLEY WEXLER,
Petitioner-Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee,

NESUHI ERTEGUN AND BELKIS ERTEGUN,
Petitioner-Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court

BRIEF FOR PETITIONERS-APPELLANTS AHMET ERTEGUN AND IOANA ERTEGUN, GERALD WEXLER AND SHIRLEY WEXLER, AND NESUHI ERTEGUN AND BELKIS ERTEGUN

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P/S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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AHMET ERTEGUN AND IOANA ERTEGUN,
Petitioner-Appellant,
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Preliminary Statement

This is an appeal from a decision of the United States Tax Court (Quealy, J.) finding deficiencies in the income tax of the appellants for the calendar year 1967.

The Memorandum and Finding of Fact and Opinion of the Tax Court, filed February 13, 1975, is unofficially reported at 34 CCH Tax Ct. Memo. 122 (1975).* The decision of the Tax Court was entered on May 23, 1975. Jurisdiction is founded under Sections 7482 and 7483 of the Internal Revenue Code of 1954 (the "Code").

During the period in question, the appellants were the owners of all of the outstanding stock of Atlantic Record Sales Co., Inc. ("Atlantic"), a duly elected subchapter S corporation. Atlantic's undistributed taxable income for its taxable year ended May 31, 1967, was included in the taxable income of the appellants pursuant to section 1373 of the Code.

The issue before this Court is whether Atlantic, in the computation of its income for Federal income tax purposes under §451(a) of the Code,** could reflect its uniform practice and agreement to accept worthless phonograph records from its distributors in lieu of 10 percent of the invoice price. In holding that Atlantic could not currently reflect

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* The opinion is reproduced on pages 113a through 130a of the Appendix. Unless otherwise indicated all page references are to the Appendix on this appeal.

** "General Rule.—The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period."

this agreement and practice, the Tax Court misunderstood the business practices before it and misapplied the relevant decisional law. These serious errors made by the Tax Court extend far beyond the tax deficiencies found against the individual appellants and may have a substantial impact on other record companies both large and small, which employ the same pricing policy.

Issue Presented for Review

Was it proper for Atlantic, in computing its income for Federal income tax purposes, to reflect currently its uniform practice and agreement to accept worthless single records from its distributors in lieu of 10 percent of the invoice price?

Statement of the Case

The facts of this case are essentially undisputed. Atlantic was a New York corporation which was dissolved on December 1, 1967. Throughout its existence, Atlantic kept its books on the accrual method of accounting (116a, 8a).

Atlantic was engaged in the business of selling phonograph records at wholesale under "Atlantic" and "Atco" labels. The records Atlantic sold included 45 rpm singles ("singles") and 33 rpm albums. During its taxable year ended May 31, 1967, Atlantic sold records to 58 customers, forty-one of whom were regular distributors of phonograph records located throughout the United States ("distributors").* Almost all of Atlantic's sales were to its distributors (117a, 10a-11a, 29a-30a).

* The remaining seventeen were mail order houses, military post exchanges and exporters.

During the relevant time period, Atlantic gave its distributors a 10 percent discount on their purchases of singles by agreeing to accept from each distributor a quantity of worthless singles equal to 10 percent of such distributor's purchases of singles from Atlantic. This discount arrangement was known as a 10 percent return privilege (43a-49a, 89a-92a).

The 10 percent return privilege was not offered to protect distributors from unsold inventory. The only purpose served by the return of the worthless singles was reduction of Atlantic's liability for royalties.* It made no difference whether the distributor had sold all the singles purchased from Atlantic. A distributor could return any single with an Atlantic of Atco label on it, whether or not it had been purchased by such distributor from Atlantic (119a, 43a-49a, 88a-92a). Indeed, in the event a distributor did not have on hand enough singles to obtain a full 10 percent discount, he would routinely purchase them from others. Singles purchased in this way cost the distributors between 5¢ and 15¢ each; they would be returned to Atlantic for a credit of 38.5¢ each, the regular wholesale price of a single (119a, 45a-46a, 88a-92a).

The 10 percent return privilege was set forth in writing on Atlantic's invoices (103a). Since it was always economically advantageous for the distributors to return worthless singles, during all periods herein relevant all Atlantic distributors utilized the full 10 percent return privilege (45a,

* Because royalties were based upon the recommended retail price of the singles and the number of singles sold, the returned singles reduced Atlantic's liability for royalties (119a, 44a-45a).

91a).* The singles so returned by the distributors were always destroyed by Atlantic (119a, 44a).

The 10 percent discount was computed in the following manner:

At the end of each quarter or fiscal period, Atlantic computed an amount equal to 10 percent of each distributor's purchases of singles for the relevant period. In accordance with its agreement with the distributors, Atlantic then issued return authorizations to them, authorizing them to return singles with a value equal to 10 percent of their purchases during the quarter. When the singles were returned, Atlantic issued to the distributor a credit memorandum reflecting the 10 percent discount (44a-46a). The distributors applied the amounts of the credit memoranda against the amounts owed by them to Atlantic. The distributors were at all times in debt to Atlantic in an amount in excess of their quarterly credits (118a-119a, 40a-41a, 51a, 66a, 96a).

Atlantic accounted for this business practice in the routine manner in which it accounted for all accruals, such as unpaid telephone and utility bills. At the time of sale, Atlantic included the gross amount shown on its invoice in sales income, and increased the amount of its accounts receivable. At the end of a calendar quarter, or fiscal period, Atlantic computed the amount of its 10 percent discount and made an accrual pursuant to which it reduced

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* The Tax Court decision states, almost as an afterthought, that appellants' "claim that the distributors always took full advantage of the allowance for each quarter is not adequately substantiated on the basis of the record before us." Although the statement of the Tax Court is incorrect, such a finding is not necessary to sustain appellants' position. *See* pp. 11-12, *infra*.

the amount of sales income through an addition to its account for returns and allowances and decreased its accounts receivable. Simultaneously, in order accurately to reflect the actual sales, royalty expenses were properly reduced. At the beginning of the next quarter or fiscal period, Atlantic made a normal reversing entry by increasing the amount of accounts receivable and sales income by the amounts of its accrued discounts. When the credit memoranda for the 10 percent discount were issued to Atlantic's distributors, sales and accounts receivable were appropriately reduced (120a-121a, 50a-51a).

By way of contrast, Atlantic treated other kinds of returns or discounts differently. For example, if a distributor wanted to return singles aggregating more than 10 percent of his purchases during the quarter, he would have to negotiate the return of the excess singles with Atlantic. Atlantic did not account for such excess returns in computing its taxable income until such returns were authorized and made (91a-92a). Similarly, amounts for Atlantic's two percent cash discount for early payment were not estimated and taken into account in computing taxable income. Rather, such discounts were accounted for only when earned by early payment (120a, 52a).

In the Commissioner's notice of deficiency to the appellants, the Commissioner increased the taxable income of Atlantic by the amount accrued for the 10 percent discount as of May 31, 1967 (122a). This effectively increased appellants' ratable share of Atlantic's undistributed taxable income and resulted in the deficiencies found by the Commissioner and upheld by the Tax Court.*

* The deficiencies are: for Ahmet Ertegun and Ioana Ertegun in the amount of $65,305.63, for Gerald Wexler and Shirley Wexler, in the amount of $55,073.92 and for Nesuhi Ertegun and Belkiş Ertegun in the amount of $36,681.14.

ARGUMENT

I

Atlantic properly reduced the stated invoice price of its single records to reflect the 10 percent return privilege in determining its gross income for Federal income tax purposes.

The Tax Court decision requires Atlantic to include in gross income amounts reflecting 10 percent of its stated invoice price even though it never had a right to receive, and never did receive, such amounts. That decision wholly ignores the realities of Atlantic's business practice and is thereby inconsistent with numerous decisions in which the courts have properly disregarded the form of a business arrangement and focused on its substance. *San Diego Transit-mixed Concrete Co.*, 21 CCH Tax Ct. Memo. 743 (1962); *Atzingen-Whitehouse Dairy, Inc.*, 36 T.C. 173 (1961), *Acq.* 1961-2 Cum. Bull. 3; *Pittsburgh Milk Co.*, 26 T.C. 707 (1956), *Acq.* 1962-2 Cum. Bull. 5. Here, the substance of Atlantic's business arrangement was that it sold records for 90 percent of the invoice price plus worthless records which it destroyed. Atlantic never received anything more.

In addition to ignoring the substance of the business arrangement before it, the court below erred in confusing this case with the standard sale or return situation in which a publisher of books or a distributor of magazines sells to retail outlets and permits the return of all unsold merchandise in good condition. *See e.g., J.J. Little & Ives Co.*, 25 CCH Tax Ct. Memo. 372 (1966) and *Scott Krauss News Agency, Inc.*, 23 CCH Tax Ct. Memo. 1007 (1964).

A. The Tax Court erred in determining sales income solely on book entries and ignoring Atlantic's actual business practice.

Because the Tax Court misunderstood the facts before it and misapplied the law, it never focused on the central issue raised by appellants: the true selling price of Atlantic's singles. Instead, it simply assumed that the selling price was the invoice price because the 10 percent discount was not mechanically booked at the time of sale.

The Court's unwavering focus on the timing of the return authorizations is best reflected in the following quotations from its decision:

> "During the period in question, Atlantic always had the right to collect the full purchase price from its regular distributors on the sales of single records. This right was in no way affected or diminished by Atlantic subsequently issuing authorizations for the return of 10 percent of the singles sold during such period. Indeed, under the payment plan in effect, the full purchase price on these singles were due and owing before any return authorization was issued with respect to such records." (127a)

And in a footnote, the Court added:

> "Payments on the purchase price of singles were due on the tenth day following the month of purchase. The return authorization was not generally issued until 2 to 3 weeks after the end of the quarter." (127a fn. 8)

The Tax Court's wooden adherence to form led it to ignore entirely the substance of Atlantic's business arrangements. That arrangement was simply that singles were sold for 90 percent of the invoice price plus certain worth-

less singles which Atlantic destroyed. The distributors never had to pay Atlantic the full invoice price.

The reality of the business arrangement—uncontradicted in the record—was that at all times each distributor owed Atlantic amounts in excess of its 10 percent discount. Accordingly, when the singles were returned, the amount of the credit memorandum would simply be applied against the amount the distributor then owed to Atlantic.* The obligation to issue the return authorizations arose at the moment the singles were shipped to the distributors. Notwithstanding that credit memoranda were not formally issued until after the worthless singles were returned, it was always understood and agreed that each distributor had the right to pay 10 percent of the invoice price with worthless singles.

In contrast to the approach adopted by the Tax Court, it has been consistently held that the time of the computation of a discount or the time of its payment or crediting is not determinative. Rebates or credits given or entered after billing (or indeed, after payment) may prop-

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* Indeed, the Tax Court itself acknowledged during the cross-examination by respondent of one of Atlantic's distributors that the timing of the issuance of a credit memorandum was immaterial since the distributor always owed Atlantic money:

"Q. And how is this reflected. Did they send you a—
A. A credit memo.

Q. A credit memo.
A. Um-hum.

The Court: But wouldn't you actually take the credit when you shipped it?

The Witness: Would we actually take the credit? No.

The Court: You wouldn't. Oh, that's right. You still owed them money anyway on this account.

The Witness: Right." (94a)

erly reduce gross income to reflect the net sales price. *Atzingen-Whitehouse Dairy, Inc., supra; Pittsburgh Milk Co., supra.* Similarly, the timing of the completion of the paperwork or the book entries evidencing standard pricing terms should also not preclude reflecting the actual sales price in gross income.

In *Atzingen,* the Tax Court held that a seller of milk and other dairy products to wholesalers who kept its books on the accrual basis, properly reduced its gross income by certain discounts which it granted to its customers. The discounts at issue in *Atzingen* were not reflected on invoices, but rather were orally arranged to evade a regulatory agency's minimum prices. Taxpayer issued regular invoices to its customers consistent with the regulated price structure and, in most instances, collected daily the actual invoiced amounts. Taxpayer recorded such sales on its books at the invoice prices. At the same time, however, taxpayer made oral arrangements with certain customers to rebate a percentage of the invoice prices. Such rebates were computed by applying the prearranged discount rate to the customer's total monthly sales. Most of taxpayer's customers received cash rebates once a month; some received cash rebates once a year and the remainder received rebates quarterly.

Properly disregarding form for substance, the Tax Court held "that the actual prices at which * * * [taxpayer] sold its products were the invoice prices minus the discounts agreed upon between * * * [taxpayer] and its customers." (36 T.C. at 181). Following its earlier decision in *Pittsburgh Milk Co., supra,* the Tax Court ruled

"* * * that in computing gross income the amount of petitioner's sales must be based upon its *actual* prices *and not* upon the *theoretical* legal minimum prices." *Id.* (emphasis added). The fact that the cash rebates may have been computed and paid by taxpayer after the end of the taxable period was immaterial.

Pittsburgh Milk Co. had presented a virtually identical situation and an identical result. As in *Atzingen,* the time of computation—and payment—of the rebates was irrelevant. *See also Allen Schiffman,* 47 T.C. 537 (1967); *Tri-State Beverage Distributors, Inc.,* 27 T.C. 1026 (1957); *Albert C. Becken, Jr.,* 5 T.C. 498 (1945); *American Cigar Co.,* 21 B.T.A. 464 (1930); and *American Lace Mfg. Co.,* 8 B.T.A. 419 (1927).

In *Atzingen* and *Pittsburgh Milk Co.* the substance of the pricing arrangements differed from the form in order to circumvent state price controls, and in both cases the Tax Court held that substance must control, regardless of the precise order of events. Here, the substance of the business arrangement differed from the form in order to reduce Atlantic's royalty expense, and, as in prior cases, substance should control also.

The substance of Atlantic's business practice was that it had a right to receive 90 percent of the invoice price plus worthless singles. Even if the distributors did not always return the worthless singles, an exceedingly unlikely event,* there can be no question that such was the standard

* Of course, the fact remains—as the record amply demonstrates—that all the distributors always took full advantage of the 10 percent discount. Appellants introduced substantial evidence at trial in support of this fact; it was testified to unequivocally and without contradiction by both witnesses at the trial (43a-52a, 90a-92a). Moreover, the respondent essentially conceded the point by not even attempting to

(footnote continued on next page)

and expected form of payment. The distributors' right to that form of payment prevented Atlantic from accruing the last 10 percent of the invoice price. Under Atlantic's accrual method of accounting, "income is includible in gross income when all the events have occurred which fix the right to receive such income * * *." Treasury Regulation §1.451-1(a). At the time of sale, Atlantic's right to receive the last 10 percent of the invoice price was neither fixed nor certain. Accordingly, Atlantic properly accounted for the 10 percent discount by accruing only 90 percent of the invoice price at the time of sale.

B. The Tax Court erred in characterizing Atlantic's arrangements with its distributors as a sale or return contract.

The Tax Court's characterization of Atlantic's 10 percent discount as a typical sale or return arrangement of the type involved in *Little & Ives, supra* and *Scott Krauss, supra* (130a), reflects a serious misunderstanding of the instant case, as well as the decisions upon which it so misplaced its reliance.

Little & Ives involved the sale of a series of general reference books directly to retail outlets. At the end of the promotion period, the publisher permitted the retail outlets to return all unsold volumes purchased from it. The returned books were repackaged and returned to inventory, after which they were resold to other retailers in other geographical areas. If the books were damaged, the retailer could not return them and was not entitled to receive a

cross-examine on it (68a-73a, 93a-96a), and by asserting in objections to petitioners' requested findings of fact only that such finding was "irrelevant and immaterial." In short, the Commissioner has not challenged the evidentiary fact that Atlantic's distributors during all periods herein relevant always fully availed themselves of the 10 percent return privilege.

credit. The taxpayer claimed that it was entitled to accrue a deduction for anticipated returns. In the alternative, it argued that the arrangement was, in reality, a consignment. The Tax Court held that the transaction was a sale or return arrangement, that it was not a consignment and that the taxpayer could not accrue a deduction for "anticipated returns" under the facts there presented.

Scott Krauss involved a wholesale distributor of magazines who claimed he sold magazines to retailers on consignment. The taxpayer agreed that if delivery to the retailer was in fact a sale, he could not accrue a deduction for possible future magazine returns. The distributor permitted the retailers to return, for full credit, all magazines purchased from the distributor which remained unsold after public display for an agreed period. The Tax Court held delivery of the magazines to the retailer was a sale with respect to which estimated future returns could not be accrued.

There is little similarity between the *Little & Ives* or *Scott Krauss* cases and the case now before this Court. Those returns depended solely upon the success of the retailer in selling his merchandise. To the extent a retailer had unsold inventory, the returns would be made. There was no way accurately to estimate the amount of the returns until they were actually made. In Atlantic's case, however, it was certain that a number of singles equal to 10 percent of the singles purchased the previous quarter would always be delivered to Atlantic by each distributor. That pattern did not vary.

Little & Ives and *Scott Krauss* present the typical situation of unlimited returns in the book publishing and

magazine distribution business. It has no relevance to the very different arrangements in the record industry as presented here. The book publishing and magazine distribution system of unlimited returns is designed to protect the purchaser against the risk of not being able to sell the merchandise acquired. In contrast, Atlantic's 10 percent discount had no relation to the success or failure of distributors in selling the singles acquired from Atlantic. Atlantic's 10 percent price discount was not a "sale or return"; there was no connection between records sold and records returned because if a distributor did not have a sufficient number of unsold records available he could and did go out and obtain them from others at a relatively small cost. Whether or not the distributors sold all of the records purchased, they always had the right to the 10 percent discount.*

In summary, the 10 percent return privilege was in effect a mechanism for granting a price discount, entirely dissimilar to the return procedures involved in *Little & Ives* and *Scott Krauss*. The distributors always had the right to receive the 10 percent credit and offset that amount against amounts they owed Atlantic. The actual price to which Atlantic was always entitled and which was always paid by distributors was 90 percent of the invoice price. Accordingly, in order for Atlantic clearly to reflect its income for Federal income tax purposes, it properly reduced its sales income by the amount of the discount. *See e.g., Atzingen-Whitehouse Dairy, Inc., supra; Pittsburgh Milk Co., supra.*

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* It should be noted that in addition to the 10 percent return privilege, Atlantic also had a program for return of unsold records under varying circumstances (49a, 51a, 79a). That program might well be compared with the arrangements in *Little & Ives* and *Scott Krauss*. Atlantic did not deduct for Federal income tax purposes its estimates of such returns.

II

Even if Atlantic's price discount is viewed as a liability the Tax Court erred in denying current accrual of a deduction for Atlantic's obligation to pay or credit its distributors an amount equal to 10 percent of the invoice price of single records purchased.

Assuming, arguendo, that Atlantic's true sales price for singles was the invoice price, the Tax Court decision must still be reversed. That is because Atlantic properly accrued the 10 percent return privilege, as a liability, when it arose, *i.e.*, at the time of sale of the singles to which it related.

The test of accrual of a liability for tax accounting purposes has come to be known as the "all events" test. Treasury Regulation §1.461-1(a)(2) articulates the test as follows:

> "Under an accrual method of accounting, an expense is deductible for the taxable year in which all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy. * * * While no accrual shall be made in any case in which all of the events have not occurred which fix the liability, the fact that the exact amount of the liability which has been incurred cannot be determined will not prevent the accrual within the taxable year of such part thereof as can be computed with reasonable accuracy."

Whether all events have occurred to permit the accrual of a liability calls for a practical, not a formalistic test. *Lucas* v. *American Code Co.*, 280 U.S. 445, 449 (1930). Not every conceivable contingency which might relieve a tax-

payer from an obligation serves to defer accrual. *Dingle-Clark Co.*, 26 T.C. 782 (1956). The Tax Court's formulation of the relevant standard as whether the liability is "irrevocably fixed or certain" was clearly wrong.

The Circuit Courts of Appeal have not hesitated to reverse Tax Court decisions which applied an overly rigid and uncompromising construction of the all events test. *See, e.g., Central Cuba Sugar Co.* v. *Commissioner*, 198 F.2d 214 (2d Cir. 1952), *cert. denied*, 344 U.S. 874 (1952); *W.S. Badcock Corp.* v. *Commissioner*, 491 F.2d 1226 (5th Cir. 1974); *Pacific Grape Products Co.* v. *Commissioner*, 219 F.2d 862 (9th Cir. 1955). *See also, Helvering* v. *Russian Finance & Construction Corp.*, 77 F.2d 324 (2d Cir. 1935).

In *Central Cuba Sugar Co., supra*, the taxpayer accrued in the year of sale both the income from sugar as well as the commissions payable thereon. The sales commissions were not payable, however, if the purchaser breached his contract, and were subject to adjustment, along with the sale price, in accordance with final weighing prior to shipment. The Tax Court held that the indefiniteness of the commission liability prevented its accrual prior to shipment. This Court reversed, and held that accrual required "only an established liability," not certainty of amount, and that "the adjustments of the commissions required in accordance with the final weight of the sugar shipped were insubstantial."

Although a condition precedent to the existence of a liability will often prevent an accrual with respect to that liability, where the condition precedent is essentially cer-

tain or where it simply involves the performance of a ministerial act, the accrual will not be deferred because such contingencies do not create sufficient uncertainty. *See, e.g., Roy Moody Bell,* 12 CCH Tax Ct. Memo. 1321 (1953). For example, where a taxpayer will not pay a liability he has incurred until and unless he receives an invoice for the liability, or until a form is filed in connection therewith, an accrual for the liability is proper. Similarly here, the fact that worthless singles were returned before Atlantic paid this liability cannot, under the facts of this case, be considered a sufficient contingency to avoid accrual.* Atlantic treated its obligation under the 10 percent return privilege policy the same way it treated its telephone expense and electric and utility expense which it also did not pay until a subsequent event had occurred, the receipt of a bill.

It is clear the requirement that the distributors return the singles did not realistically affect Atlantic's obligation to discount the purchase price 10 percent. The return of the singles was no more than a mechanical act required for the distributor to receive the credit. Atlantic's obligation to discount the purchase price, by accepting worthless singles in lieu of 10 percent of the purchase price, was as fixed and certain at the time of sale (indeed more so) as the obligations in *Central Cuba Sugar Co., supra.* Atlantic knew the distributors would return the records to receive the credit—since it would have been economically irrational for them not to do so.

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* This Court should not be confused by the reference of the Tax Court (129a) to the adoption and repeal by Congress of Section 462 of the Code relating to the deductibility of reserves. It is clear that current deductions are not allowable for reserves. The 10 percent return privilege, however, does not represent a reserve; it is a liability which was fixed and determinable as of the close of Atlantic's taxable year.

Certainly, no one would suggest that Atlantic defer accrual of its income because of the contingnecy that the distributors might not pay. It is equally inappropriate, we submit, for the Commissioner to suggest that Atlantic defer accrual of its obligation to its distributors to discount the invoice price because of the equally insubstantial contingency that they might not return the worthless records. *Central Cuba Sugar Co., supra, W. S. Badcock Corp., supra.* And even if there were a theoretical possibility that some records would not be returned, an error in estimating the accrued obligation could be corrected in a later year. Treasury Regulation §1.461-1(a)(2) specifically permits such corrections.*

Conclusion

Learned Hand once wrote:

> "* * * [T]here is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance." *Loubriel* v. *United States,* 9 F.2d 807, 808 (2d Cir. 1926).

The Tax Court, we submit, has failed to penetrate the form to the substance. By focusing on the mechanical order of book entries, and by ignoring Atlantic's actual business practices, the Tax Court would require the appellants to pay a tax on income Atlantic neither earned nor received.

* "* * * Where a deduction is properly accrued on the basis of a computation made with reasonable accuracy and the exact amount is subsequently determined in a later taxable year, the difference, if any, between such amounts should be taken into account for the later taxable year in which such determination is made."

The law, we have seen, clearly demands otherwise. For this, and for all the foregoing reasons, the decision of the Tax Court should be reversed.

Dated: New York, New York
November 10, 1975

Respectfully submitted,

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AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Gerald Rokoff, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at **66-25 103rd Street**
Forest Hills, New York 11375

1975 I served the attached briefs and appendix upon the following attorney(s) at the address designated by him (them) for that purpose:

Appellate Section
Tax Division
Department of Justice
Washington, D.C. 20530

Attention: Arthur Bailey, Esq.

Said service was made by depositing a true copy of the attached briefs and appendix enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this

7th day of November, 1975.

Notary Public

PAUL B. GLOECKNER
Notary Public, State of New York
No. 31-4517018
Qualified in New York County
Commission Expires March 30, 1976